Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

EDWIN L. BRICKER and CYNTHIA BRICKER, husband and wife,

Petitioners,

v.

ROCKWELL HANFORD OPERATIONS, a division of ROCKWELL INTERNATIONAL CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, and WESTINGHOUSE HANFORD COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. ARE A PRIOR HISTORY OF FAILED WHISTLEBLOWER LEGISLATION, AND THE SUBSEQUENT PASSAGE OF THAT "ALTERNATIVE REMEDY" LEGISLATION AFTER FILING OF A *BIVENS* ACTION, SUFFICIENT TO DEMONSTRATE THAT CONGRESS DID NOT INADVERTENTLY DENY A COMPREHENSIVE REMEDY TO WHISTLEBLOWERS AT DEPARTMENT OF ENERGY NUCLEAR FACILITIES?

II. ARE NON-CONGRESSIONALLY CREATED ADMINISTRATIVE REMEDIES WHICH ARE NOT PART OF A COMPREHENSIVE REMEDIAL SCHEME SUFFICIENT TO CONSTITUTE A "SPECIAL FACTOR" FOR NOT ALLOWING A *BIVENS* REMEDY?

III. IS THE SEPARATION OF POWERS DOCTRINE VIOLATED BY ALLOWING A NON-CONGRESSIONALLY CREATED ADMINISTRATIVE REMEDY OF AN EXECUTIVE DEPARTMENT TO PRECLUDE A *BIVENS* REMEDY?

PARTIES TO THE PROCEEDINGS BELOW

The names of all parties to the proceedings, and their parent and subsidiary corporations, appear in the caption of the case.

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REPORTS AND OPINIONS BY OTHER COURTS AND AGENCIES

The United States District Court for the Eastern District of Washington entered an opinion and order dated September 17, 1991, which is set forth in the appendix.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is the amended opinion of the United States Court of Appeals for the Ninth Circuit dated April 15, 1994. On the same date and at the beginning of said amended opinion is an order denying the petition for rehearing and rejection of the suggestion for a rehearing en banc. The amended opinion is verbatim of the original opinion of October 25, 1993, with the exception of the short additions made in the referenced order denying rehearing. This Court has jurisdiction to review the amended opinion by writ of certiorari pursuant to 28 USC section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution:

Amendment I. Congress shall make no law * * * abridging the freedom of speech, or * * * to petition the Government for a redress of grievances.

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

and no Warrants shall issue, but upon probable cause * * * .

Amendment V. No person shall be * * * deprived of life, liberty, or property without due process of law * * * .

Energy Reorganization Act of 1974, as amended 1992:

42 USC section 5851. Employee Protection

(a) Discrimination against employee. (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) –

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 USC 2201 et seq.);

(B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

* * *

(2) For purposes of this section, the term "employer" includes – * * * (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170d. of the Atomic Energy Act of 1954 * * * .

(h) This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress

the employee's discharge or other discriminatory action taken by the employer against the employee.

* * *

Atomic Energy Act of 1954:

42 USC section 2201. General provisions

In the performance of its functions the Commission [Department of Energy] is authorized to –

* * *

(i) Regulations or orders. prescribe such regulations or orders as it may deem necessary * * * (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property; * * *

National Labor Relations Act:

29 USC section 157. Rights of employees

Employees shall have the right to * * * engage in other concerted activities for the purpose of * * * mutual aid or protection * * * .

29 USC section 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USC section 157]; * * *

29 USC section 160. Prevention of unfair labor practices

(a) The [National Labor Relations] Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

* * *

Regulations and Orders of Department of Energy:

48 CFR section 970.2201 Basic labor policies.

(b)(5) Collective bargaining. * * * (ii). In line with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at Government-owned energy installations should provide * * * an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations for the term of the agreement.

DOE Order 5483.1A Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities

1. Purpose. To establish requirements and procedures to assure that occupational safety and health standards prescribed pursuant to the Atomic Energy Act of 1951, as amended, the Energy Reorganization Act of 1974, and the Department of Energy Act of 1977, provide occupational safety and health protection for Department of Energy (DOE) contractor employees * * * which is consistent with the protection afforded private industry employees by the occupational safety and health standards promulgated under the Occupational Safety and Health Act of 1970 (OSHA), Public Law 91-596.

* * *

7. Responsibilities and Authorities.

* * *

d. (11) Require contractors to: * * * (b) Establish and implement programs and procedures in support of this Order which assure that: * * * 9. Contractor employees who exercise their rights under this Order are not discriminated against, as required by Chapter III

* * *

Chapter III. Nondiscrimination, Injury and Illness Information, and Accident Prevention

1. Nondiscrimination.

a. No contractor shall discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, or take any other negative actions against any contractor employee as a result of the employee's filing of a complaint, or in any other fashion, exercising on behalf of himself or herself or others any right set forth in this Order.

b. Any employee who believes he or she has been discharged or in any other manner discriminated against, in violation of this Order, may file a complaint with the cognizant CO [contracting officer] or CO representative within 30 days after the alleged discrimination, setting forth the nature of the alleged discrimination. The CO or CO representative * * * shall investigate the complaint, and if it is found that such discrimination has occurred, the field organization shall assure that appropriate measures are taken by the contractor, including rehiring or reinstatement of the employee, restoration of lost seniority, and back pay. * * *

CONCISE STATEMENT OF MATERIAL FACTS

Edwin Bricker was employed by the Rockwell Hanford Company at the government-owned, contractor-operated (GOCO) nuclear facility known as the Hanford Nuclear Operations. During his employment, he observed the day-to-day operations of the plant, and became aware of safety, health and environmental problems at the facility. Some of these problems implicated only worker safety, while others concerned the health and safety of neighboring communities. To address these problems, Bricker contacted his supervisors, Westinghouse officials who became the managing contractor of the facility in 1987, officials of the Department of Energy (DOE), Congressional investigators, and the press. Unbeknownst to Bricker, some of these communications were secretly monitored by Hanford plant management and security personnel. However, he was never under suspicion by management that he was leaking sensitive, classified or proprietary information to outside parties.

After learning his whistleblowing activities had been surreptitiously monitored, Bricker also discovered through corporate memoranda that security officials were ordered to develop a plan to terminate him because of his communications with Congress and the news media. Rockwell and Westinghouse officials invaded wide ranging aspects of Mr. and Mrs. Bricker's lives, amassing fourteen volumes of information about them. Security personnel interrogated dozens of Mr. Bricker's co-workers and friends, alienating co-workers through the use of threats and intimidation. They wiretapped his phones, followed him, burglarized his home of significant

papers, and intercepted his private communications using other surveillance devices and methods.

Security files on Bricker contained his religious literature, correspondence with Congress, and memoranda speculating upon co-workers who "thought like Bricker" or were "friends of Bricker." Bricker was repeatedly ordered to submit to mandatory psychiatric evaluations by Hanford doctors. These orders always occurred after he raised a significant safety or environmental concern. These company doctors never found anything wrong with him.

The DOE undertook an investigation of Mr. Bricker's complaints which culminated in a May 1990 report finding that he had been subjected to a pattern and practice of continued harassment and discrimination by Hanford management. The report cited Hanford management's improper use of forced psychiatric evaluations and the use of the security investigations as a tool of harassment. In order to provide some relief to Mr. Bricker, the DOE suggested using the provisions of a proposed DOE rule (which had not then been promulgated) as a guideline for some type of hearing. Thereafter, Mr. Bricker, Westinghouse Hanford Company, and Rockwell International agreed to accept the limited relief recommended by the investigators. There were no covenants not to sue, nor any other release of claims or rights. Because the harassment continued, the Brickers filed the present suit for money damages in the United States District Court.

BASIS OF JURISDICTION IN DISTRICT COURT

Jurisdiction over Mr. Bricker's speech, petition, privacy, and due process constitutional claims in the U.S. District Court was granted by 28 USC section 1331. These are federal questions under the First, Fourth, and Fifth Amendments.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Summary of Grounds for Review: There are two primary grounds upon which this petition is based. First, the Ninth Circuit's decision is one upon an important federal question which has been decided in a way which conflicts with the applicable decisions of this Court regarding actions under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 US 388 (1971); and regarding more broadly the rules of statutory construction. Secondly, the Ninth Circuit's decision is in conflict with one of the Eighth Circuit regarding the disallowance of a *Bivens* action based upon a non-Congressionally created administrative remedy, and regarding the implications of this upon separation of powers doctrine. *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991).

Statutory Construction and *Bivens* Actions: The Ninth Circuit erred in denying Bricker a *Bivens* remedy on the grounds that the 1992 Amendments of the Energy Reorganization Act evidenced a Congressional intent that DOE contractor employees be limited to statutory remedies. The 1992 remedy is neither "equally effective", nor a "special factor". Prior to filing of this action, the Energy Reorganization Act of 1974 (ERA), 42 USC section

5851, provided remedies only for employees of contractors of the Nuclear Regulatory Commission, but not for those of the Department of Energy (DOE). Subsequent to filing, however, the Congress amended the ERA to cover DOE contractor employees as well.[1] Congress did this in express recognition that "accounts of whistleblower harassment at * * * DOE nuclear facilities (e.g., Hanford, Oak Ridge, Rocky Flats) suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry." (*Bricker* amended opinion at p. 3693). In so amending the ERA, Congress specifically provided:

> This section may not be construed to expand, diminish, or otherwise affect *any right* otherwise available to an employee under *Federal* or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

---

[1] There is nothing in the record below whatsoever which establishes that the Brickers could have addressed any, much less all, of their claims under the ERA, DOE order, etc., even were they to apply to them. Whistleblower statutes protect not classes (such as "DOE contractor employees"), but "activity" defined by those statutes, i.e., whistleblowing. However, only whistleblowing within a confined subject matter is protected. The ERA, 42 USC sec. 5851 (a)(1)(A) and (B) cover protected activity only so far as it involves blowing the whistle on "an alleged *violation* of this chapter or the Atomic Energy Act of 1954" and/or regarding "any practice made *unlawful*" thereunder. For example, an NRC (or now DOE) contractor employee who is a secretary blowing the whistle on theft of typewriters is a "whistleblower", and may have a remedy under some statute, but *not* under the ERA, since the ERA regulates only certain aspects of nuclear power and fuels, not theft of office equipment.

42 USC sec. 5851(h), October 24, 1992 (emphasis added).

Despite this provision, the Ninth Circuit decision holds, in *sua sponte* fashion,[2] that a *subsequently* enacted statutory remedy for Bricker's class of DOE-contractor employees evidences *past* Congressional intent that the class *previously* had no remedy under *Bivens*. If allowed to stand, this decision will have far reaching effects on the availability of *Bivens* remedies in virtually any judicial context.

Under *Bivens*, a remedy may be implied by the courts for constitutional violations where (1) Congress has not provided an "equally effective alternative remedy"; or (2) where "special factors" are present. The "special factor" at issue here is whether there are indications that Congressional failure to legislate an equally effective alternative remedy was "not inadvertent". Never before has the Supreme Court or any Court of Appeals held that the *subsequent* enactment of a remedy could retroactively evidence a Congressional intent that the affected class *previously* never should have had a *Bivens* or other remedy.[3]

---

[2] Because the Energy Reorganization Act amendments of 1992, 42 USC sec. 5851, came subsequent to the briefing of this case, no party's brief addressed the effect of such subsequent legislation on a pending *Bivens* claim. Nor did any party assert at oral argument the rationale adopted by the panel decision.

[3] The Supreme Court decisions to date had applied the Congressional inadvertence analysis only to cases where Congress have *passed*, not failed, "comprehensive" statutory schemes for addressing, or excluding, the wrongs complained of in the *Bivens* action. *Schweiker v. Chilicky*, 887 US 412 (1988) and *Bush v. Lucas*, 462 US 367 (1983). Moreover, these statutory remedies were enacted *before, not after*, the *Bivens* actions were filed.

The Ninth Circuit did not rule on the effects of *failed* ERA amendments *preceding* the *Bivens* action, but upon those which *passed subsequent* to it. The decision states:

> We need not attempt to discern Congress's intent in 1978 when it passed section 210 of the Energy Reorganization Act because we conclude that Congress's *subsequent* decision regarding remedies for whistleblowers at DOE nuclear facilities undermine the Brickers' argument. * * * It is true that we must be reluctant to draw conclusions concerning congressional intent from the mere failure of bills to pass. Cf. *Balelo v. Baldridge*, 724 F2d 753, 762-63 (9th Cir.) * * * . Nevertheless, the various attempts at legislation *may* suggest that Congress's inaction, whatever its reason, was not wholly inadvertent. Moreover, in 1992, Congress enacted amendments to the Energy Reorganization Act of 1974 that provide whistleblower protection for employees at DOE nuclear facilities, including a provision that allows recovery of compensatory damages – precisely the remedy that the Brickers seek in this action. * * *
>
> Through these amendments, which came too late for the Brickers, Congress has provided an elaborate and comprehensive remedial scheme. * * *

Bricker amended opinion at 3691 (emphasis added).[4]

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[4] The term "may" is emphasized to show that the Ninth Circuit considered, but did not rule upon the effects of the failed legislation. Instead, the panel chose to base its decision on the effects of the subsequent amendments.

Having provided this legislative context, the Ninth Circuit went on to emphatically hold, *without any citation of relevant precedent*, that the *subsequent* amendments of the ERA, not the prior failed bills, were fatal to the *Bivens* claims:

> These amendments, however, provide only prospective relief; they apply to claims filed on or after October 24, 1992, the date of enactment. [Citations omitted]. The fact that the amendments were given only prospective effect suggest that Congress did not inadvertently fail to provide relief to persons, such as the Brickers, who filed claims before October 24, 1992. * * *
>
> * * *
>
> We cannot create a *Bivens* remedy if there are "indications that congressional inaction has not been inadvertent" *Schweiker*, 487 US at 423; see also *McCarthy v. Madigan*, 112 S Ct 1081, 1090 (1992) * * * . Because we cannot characterize as inadvertent Congress's decision not to include within its remedial scheme persons who filed claims before October 24, 1992, we are precluded from implying a *Bivens* remedy for the Brickers' claims.

Bricker amended opinion at 3692-93.

There are two major problems with this holding. First, this decision, as stated, is simply without precedent. If it is to be the law, then it must be recognized as creating an entirely new rule of statutory construction. The Supreme Court in *Pension Ben. Guaranty Corp. v. LTV Corp.*, 110 S.Ct. 2668, 2678 (1990), stated:

> [In construing a statute], subsequent legislative history is a hazardous basis for inferring the

> intent of an earlier Congress and is a particularly dangerous ground on which to rest an interpretation of a prior statute when the subsequent history concerns a proposal that does not become law; congressional inaction lacks persuasive significance, because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

The ramifications for such an unprecedented new approach are appropriate for Supreme Court review.

Non-Congressionally Created Administrative Remedies:

The Ninth Circuit erred in denying Bricker a *Bivens* remedy on the grounds that a combination of administrative remedies and potential venues for complaint were available to Bricker. These could not alone or in sum constitute either an "equally effective alternative remedy", nor "special factor counselling hesitation". The amended opinion gives considerable weight to two administrative procedures potentially available to Bricker, both vaguely based on sentence-or-two enabling legislation. (Bricker amended opinion at 3694-95). The court gave no indication of how these could be used to address community-wide environmental concerns, or the types of retaliation which included wiretapping, surveillance and intrusions to his home. Both of the lower courts acknowledged that these sundry administrative and statutory provisions fall short of what Supreme Court precedents seem to literally require, but both courts accepted them as enough to kill a *Bivens* action anyway:

> The district court concluded that "[although] these remedies, either alone or in combination, do not constitute a comprehensive statutory scheme, they are in fact a remedial mechanism designed to provide relief in circumstances that exist in the instant case[.]"

Bricker amended opinion at 3695.

The first is 48 CFR section 970.2201(b)(5)(ii), which simply requires all collective bargaining agreements (CBA) to contain effective grievance procedures. The regulation contains no substantive or procedural requirements or standards. This requirement for a CBA grievance procedure is no more specific than the cited provisions to the National Labor Relations Act (NLRA), 29 USC sections 157, 158 and 160. All the latter reference are the rights of employees, in the broadest terms, to engage in on-the-job "mutual aid or protection", and to complain to the NLRB about any employer action believed to be an "unfair labor practice". To accept the logic of this argument equates to a holding that a *Bivens* remedy against an employer for virtually any wrong is *per se* closed off to anyone arguably protected by the general scope of the NLRA.

The second administrative procedure cited by the Ninth Circuit is DOE order 5438.1A, which by its owns terms is limited to occupational safety and health concerns. Additionally, except for the general language of 42 USC section 2201(i)(3) giving the DOE power to "protect health and to minimize danger to life or property", this DOE order has been attributed to no Congressional action.

This Court's decision in *McCarty v. Madigan*, 112 S. Ct. 1081 (1992) addressed the issue of whether the existence of an "administratively" created remedy may constitute a "special factor" under *Bivens* analysis.[5] In *McCarthy*, the Bureau of Prisons argued that the existence of a grievance procedure formally adopted and published in the Code of Federal Regulations, and implemented pursuant to a general grant of authority by Congress, was dispositive of a prisoner's *Bivens* suit. The Bureau did *not* argue that the grievance procedure completely eliminated *Bivens* relief.[6] Instead, the government asserted a much more timid position that under the *Chilicky* analysis, the grievance procedure should at least modify *Carlson* to provide for an administrative exhaustion requirement. The Supreme Court held that a non-congressionally adopted grievance procedure could not even have that effect. The Court stated at 117 L Ed 2d 303-04:

> [R]espondents appear to confuse the presence of *special* factors with *any* factors counseling hesitation. * * * [Court's emphasis].

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[5] The Ninth Circuit amended its original opinion after Mr. Bricker complained in his petition for rehearing that the court had failed to consider an important U.S. Supreme Court decision rendered after the briefs were submitted, but presented at oral argument. *McCarthy v. Madigan*, 112 S Ct 1081 (1992).

[6] Prisoner actions under *Bivens* were approved in *Carlson v. Green*, 446 US 14 (1980), eight years before the restrictive "Congressional inadvertence" analysis adopted in *Schweiker v. Chilicky*, supra. It is significant that the Attorney General did not argue that the grievance procedure should be used as a special factor to overrule *Carlson*.

> Interpreting the "special factors" exception in *Schweiker* * * * and in *Bush* * * * [citations omitted], the Court found the *Bivens* remedy displaced because Congress had legislated an elaborate and comprehensive remedial scheme. * * * Here Congress has enacted nothing.

As to the general grant of rulemaking authority to the Bureau, the Court rejected that this could suffice as the required Congressional involvement. The Court stated at 117 L Ed 2d 302:

> We think respondents confuse what Congress could be claimed to allow by implication with what Congress affirmatively has requested or required. By delegating authority, in the most general terms, to the Bureau to administer the federal prison system, Congress cannot be said to have spoken to the particular issue whether prisoners in the custody of the Bureau should have direct access to the federal courts.

Despite this language which clearly questions considering non-Congressionally created remedies as a "special factor", the Ninth Circuit decision discounts it as merely "some language that can be read as favorable to the Brickers". Bricker amended opinion at 3698.

The magnitude of Congressional involvement is at the core and principle of special factors analysis. In *Chilicky*, the court described Congressional involvement and the statutory scheme as follows:

> [An] "elaborate remedial scheme devised by Congress", [487 US at 414;] * * * [an] "administrative structure and procedure * * * of a size and extent difficult to comprehend", [id at

> 424]; * * * [as providing] "judicial review, including review of constitutional claims", [id]; * * * [as] "considerably more elaborate than the civil service system considered in Bush", [id at 425]; * * * [and as representing] "Congressional attention [that has] * * * been frequent and intense", [id.].

The *Bush* Court described Congressional involvement and the statutory scheme as follows:

> "[A]n elaborate, comprehensive scheme", 462 US at 385; * * * [that] "apply to a multitude of personnel decisions that are made daily by federal agencies"; * * * [as imbued with a] "history of the development of civil service remedies and the comprehensive nature of the remedies currently available"; * * * [and as] "an elaborate remedial system that has been constructed step by step, with careful consideration to conflicting policy considerations"; [id at 388].

Before the Bricker's filed their *Bivens* action, there had been no Congressional involvement of any significant magnitude, much less any which could be deemed "intense", "comprehensive" or even "carefully considered". Only after the Bricker's filed their action did Congress adopt the 1992 amendments to the ERA.

Additionally, to accept the argument that the submitted DOE activity can be the basis for a district court to defer remedy determinations to that agency is to disregard constitutional separation of powers doctrine. In *Krueger* at 1055, the 8th Circuit found: "Only Congress has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action." The court elaborated that:

> To allow an administratively-created scheme to foreclose a *Bivens* action, without some real indication that Congress intended the administratively-created scheme to have that result, would require us to hold that the legislative power to foreclose a *Bivens* action has been delegated – a delegation almost certainly in violation of the separation of powers doctrine.

See also, Tribe, *American Constitutional Law* (2d Ed. 1988), pp. 363-64, and *Mistretta v. United States*, 488 US 361, 372 (1989), reiterating that no delegation of powers from the Congress to the executive or judiciary may be effective unless Congress has laid "down by legislative act an intelligible principle to which the person or body * * * is directed to conform". Nothing cited by the Ninth Circuit demonstrates that this standard has been met.

CONCLUSION

The petition for writ of certiorari should be granted, and the Ninth Circuit decision should be reversed.

Respectfully submitted,

THAD M. GUYER
Attorney for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWIN L. BRICKER; CYNTHIA BRICKER, husband and wife,
Plaintiffs-Appellants,

v.

ROCKWELL INTERNATIONAL CORPORATION; ROCKWELL HANFORD CORPORATION; WESTINGHOUSE CORPORATION; WESTINGHOUSE HANFORD CORPORATION,
Defendants-Appellees.

No. 91-36153

D.C. No. CV-90-3090-AAM

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding

Argued and Submitted
July 12, 1993—Seattle, Washington

Filed October 25, 1993
Amended April 15, 1994

Before: William C. Canby, Jr., Charles Wiggins and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Individual Rights/Constitutional Rights/Labor and Employment

The court of appeals affirmed a district court judgment. The court held that a worker at a Department of Energy (DOE)

nuclear facility could not seek money damages against DOE contractors who allegedly violated his constitutional rights by harassing him for voicing safety concerns.

Appellant Edwin Bricker worked at the Hanford Nuclear Reservation, a government-owned, contractor-operated (GOCO) nuclear facility. A division of appellee Rockwell International Corp. operated portions of the facility, and appellee Westinghouse Hanford Co. was the management contractor. Bricker and his wife sued Rockwell and Westinghouse, alleging that they violated Bricker's constitutional rights. The Brickers alleged that the companies subjected him to various forms of harassment after he voiced his concerns regarding safety, health and environmental problems at the facility. The Brickers sought a *Bivens* remedy, money damages for the constitutional violations in an action under federal law against federal officers acting under color of their authority.

Rockwell and Westinghouse filed a motion to dismiss the claims, asserting that there were "special factors" that precluded the judicial creation of a *Bivens* remedy. The district court granted the motion, finding that Congress' failure to extend whistleblower protection to employees of DOE contractors was deliberate. Accordingly, the court found that Congress' decision not to provide the damages remedy sought by the Brickers constituted a "special factor counseling hesitation" within the meaning of a case that followed *Bivens*, precluding the *Bivens* remedy. The Brickers appealed.

[1] Statutory amendments providing whistleblower protection for employees at DOE facilities suggest that Congress did not inadvertently fail to provide relief to persons who filed claims at the time the Brickers did. **[2]** Thus, a *Bivens* remedy cannot be implied for the Brickers' claims.

[3] Moreover, remedies available to Bricker were sufficient to bar the judicial creation of a *Bivens* remedy.

COUNSEL

Thad Guyer, T.M. Guyer & Friends, P.C., Medford, Oregon; Michael E. Withey, Schroeter, Goldmark & Bender, Seattle, Washington, for the plaintiffs-appellants.

David F. Jurca and Mark F. Rising, Helsell, Fetterman, Martin, Todd & Hokanson, Seattle, Washington, for defendant-appellee Rockwell International Corporation; William R. Squires III, Stuart R. Dunwoody, and Bergitta K. Trelstad, Davis Wright Tremaine, Seattle, Washington, and Robert A. Dutton, Assistant General Counsel, Westinghouse Hanford Company, Richland, Washington, for defendant-appellee Westinghouse Hanford Company.

ORDER

The opinion filed October 25, 1993 is amended by inserting the following passage at slip op. p. 11980, immediately before the section heading entitled "Nondelegation Doctrine":

> The Brickers also rely on *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992), which was decided after the Brickers' briefs were filed. At oral argument, the Brickers asserted that *McCarthy* precludes a finding that administratively created remedial schemes can foreclose the creation of a *Bivens* remedy.
>
> In *McCarthy*, the Court held that prisoners need not exhaust the Federal Bureau of Prisons' (Bureau) grievance procedure before initiating a *Bivens* action against prison employees. Although the *McCarthy* opinion contains some language that can be read as favorable to the Brickers, we conclude for two reasons that *McCarthy* is not inconsistent with our holding here.

First, the grievance procedure at issue in *McCarthy* was qualitatively different from the remedies available to the Brickers. *See* 112 S.Ct. at 1085 ("The general grievance regulations do not provide for any kind of hearing or for the granting of any particular type of relief.") In contrast, as we already have noted, the Brickers options included arbitration (ultimately) under the CBA as well as potential remedies under DOE Order 5438.1A and the NLRA. Moreover, unlike the situation in *McCarthy* where monetary damages were entirely unavailable to the prisoner, DOE order 5438.1A expressly allowed recovery of monetary damages, at least with respect to back pay.

Second, the Court simply was not deciding the issue that we decide today. The Court was considering the propriety of imposing an exhaustion requirement before institution of an *already recognized Bivens* action. The policy considerations underlying the Court's exhaustion analysis are inapplicable to the situation presented in this case. *See Id.*, 112 S.Ct. at 1087-88. For example, here there is no "doubt as to whether the [NLRB or DOE were] empowered to grant effective relief," *id.* at 1088. *See* 42 U.S.C. § 2201(i)(3) (1988); 29 U.S.C. §§ 158, 160. This case also does not arise in a context where "the administrative body is shown to be biased or [to have] otherwise predetermined the issue before it," *id.*, because the DOE (at least with respect to GOCO facilities) and the NLRB are not called upon to evaluate the rights of third-party's against their own employees when acting upon claims such as the Brickers'.

In sum, we conclude that the Court did not, when it decided the exhaustion issue presented in *McCarthy*, preclude our holding here—that the com-

prehensive administrative remedial mechanisms available to the Brickers, viewed against the background of congressional inaction that was not inadvertent, prevents the creation of a new *Bivens* remedy.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

OPINION

CANBY, Circuit Judge:

Edwin and Cynthia Bricker appeal the district court's summary judgment in favor of the defendants in the Brickers' action alleging violations of their federal constitutional rights and various tort claims under Washington state law. We review de novo, *Saul v. United States*, 928 F.2d 829, 832 (9th Cir. 1991), and we affirm.

I. FACTUAL & PROCEDURAL BACKGROUND

In August 1990, Edwin Bricker and his wife Cynthia filed this action against Rockwell Hanford Operations, a division of Rockwell International Corporation ("Rockwell"), Westinghouse Electric Corporation, and Westinghouse Hanford Company ("Westinghouse"). The Brickers' complaint alleged violations of their First, Fourth, and Fifth Amendment rights, and several pendent state law claims. These claims stemmed

from Edwin Bricker's employment at the Hanford Nuclear Reservation ("Hanford"), located in Washington State. Hanford is owned by the United States, but is managed by private corporations pursuant to a contract with the Department of Energy ("DOE"). Hanford therefore is known as a government-owned, contractor-operated ("GOCO") nuclear facility. Rockwell operated certain portions of Hanford from July 1977 through June 28, 1987; Westinghouse became the management contractor on June 29, 1987. Bricker was employed at Hanford from July 1977 through August 1979, when he left to attend college. Bricker returned to work at Hanford in February 1983 and remained an employee there until November 1991.

The Brickers' complaint alleged that, while Edwin Bricker was employed at Hanford, he became aware of safety, health, and environmental problems at the facility. He voiced his concerns about these matters to his supervisors, officials of Rockwell and Westinghouse, members of Congress, and the news media. The complaint further alleged that, in retaliation for his "whistleblowing" activities, Rockwell and Westinghouse subjected Bricker to various forms of harassment, thereby violating Bricker's federal constitutional rights and committing various state law torts. The Brickers' constitutional claims were predicated on the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

In April 1991, Rockwell and Westinghouse filed a motion to dismiss the Brickers' constitutional claims for failure to state a claim[1] and asserted that there were "special factors" that precluded the judicial creation of a *Bivens* remedy. The district court granted the defendants' motion and dismissed the Brickers' constitutional claims with prejudice. Because the dismissal of the federal claims eliminated the independent

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[1]The district court treated the motion to dismiss as one for summary judgment as provided in Fed. R. Civ. Proc. 12(b).

basis for subject matter jurisdiction, the court also dismissed the Brickers' pendent state claims without prejudice. This appeal followed.[2]

II. LEGAL FRAMEWORK

Whether a *Bivens* remedy can be implied for "whistleblowers" employed at GOCO nuclear facilities is a question of first impression in this circuit. Our analysis of this issue, however, is guided by the Supreme Court's articulation of the factors that courts must consider when determining whether to create a *Bivens* remedy. In *Bivens*, the Supreme Court held that the victim of a Fourth Amendment violation committed by federal officers acting under color of their authority could bring an action under federal law for money damages against the officers. 403 U.S. at 389. The *Bivens* Court observed that "[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. The Supreme Court subsequently has allowed "*Bivens* actions" for money damages against federal officers who violate the due process clause of

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[2]In its order granting summary judgment, the district court noted that "[t]he record as it currently stands is insufficient for any determination as to whether defendants are 'federal actors' against whom liability can be imposed under *Bivens*. Nor, for the purposes of defendants [sic] motion to dismiss constitutional claims, shall the court assume that the defendants are federal actors." Of course, a determination that Rockwell and Westinghouse were not federal officers acting under color of their federal authority would be an independent bar to the maintenance of a *Bivens* action against them. *See Bivens*, 403 U.S. at 389 (creating cause of action against federal agent acting under color of his authority). Nevertheless, despite the absence of a finding on this issue, we conclude that the district court had jurisdiction because the Brickers' complaint contains a nonfrivolous allegation that the defendants are federal actors. *See Keniston v. Roberts*, 717 F.2d 1295, 1298 (9th Cir. 1983) (federal jurisdiction is established if the complaint claims a right to recover under federal law and the claim is not " 'wholly insubstantial and frivolous' ") (citing *Jackson Transit Auth. v. Local Div. 1285*, 457 U.S. 15, 21 n.6 (1982)) (additional citations omitted).

the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the cruel and unusual punishment clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). "In each of these cases, as in *Bivens* itself, the Court found that there were no 'special factors counselling hesitation in the absence of affirmative action by Congress,' no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (citations omitted).

More recently, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker*, 487 U.S. at 421. In *Chappell v. Wallace*, 462 U.S. 296 (1983), the Court refused to create a *Bivens* action for enlisted military personnel who alleged that they had been injured by the unconstitutional actions of their superior officers. Similarly, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court unanimously refused to create a *Bivens* remedy for a federal employee who alleged that his supervisor had improperly disciplined him for exercising his First Amendment rights. In reaching this decision, the Court assumed that a First Amendment violation had occurred and acknowledged that "existing remedies do not provide complete relief for the plaintiff." 462 U.S. at 388. The Court justified its refusal by explaining that Congress was in a better position to balance the competing policy concerns of "governmental efficiency and the rights of employees." *Id.* at 389.

In *Schweiker v. Chilicky*, the Court refused to create a *Bivens* remedy for persons who were improperly denied Social Security disability benefits, allegedly as a result of due process violations by the federal officials who administered the program. 487 U.S. at 414. The Supreme Court acknowledged that "exactly as in *Bush*, Congress has failed to provide for 'complete relief': respondents have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits." *Id.* at 425. Nevertheless, *Schweiker* explained that:

> the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Schweiker, 487 U.S. at 423; *see also Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989) ("[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment, because 'Congress is the body charged with making the inevitable compromises required in the design of a massive and complex . . . program' ") (quoting *Schweiker*, 487 U.S. at 429).

III. DISCUSSION

A. Congressional Inadvertence

The Brickers first argue that Congress's failure to create "whistleblower" protection for employees at DOE nuclear facilities, was inadvertent and that a remedy for money damages therefore should be judicially created. We disagree.

A statutory remedial scheme for workers who expose health and safety violations at nuclear facilities was first enacted in 1978, when Congress added section 210 to the Energy Reorganization Act of 1974. 42 U.S.C. § 5851 (1988). Section 210 prohibits discrimination against "whistleblowers" at commercial nuclear facilities regulated by the Nuclear Regulatory Commission ("NRC"). *Id.* Among the remedies available to such employees are reinstatement with back pay, compensatory damages, and attorney's and expert witness fees incurred in prosecuting a complaint. 42 U.S.C.

§ 5851(b)(2)(B). When the alleged harassment of Edwin Bricker occurred, however, section 210 did not provide a remedy for employees of DOE-owned, contractor-operated nuclear facilities, such as Hanford. *See Adams v. Dole*, 927 F.2d 771, 776-78 (4th Cir.) (section 210's whistleblower protections apply only to employees of licensees of the NRC; section 210 does not apply to employees of contractors operating nuclear facilities owned by the DOE), *cert. denied*, 112 S. Ct. 122 (1991).[3] After examining the legislative history, *Adams* held that, in passing section 210, Congress "intended to exclude employees of DOE contractors." *Id.* at 777. Here, the district court agreed with the Fourth Circuit's analysis and ruled that Congress's failure to extend whistleblower protection to employees of DOE contractors was deliberate. Accordingly, the district court found that Congress's decision not to provide the damages remedy sought by the Brickers constituted a "special factor counselling hesitation" within the meaning of *Schweiker*, 487 U.S. at 423, and precluded the judicial creation of a *Bivens* remedy.

The Brickers do not dispute that, prior to October 24, 1992, section 210 of the Energy Reorganization Act did not apply to employees at DOE-owned, contractor-operated nuclear facilities. Instead, they contend that the district court incorrectly concluded that Congress deliberately chose not to provide such a remedy. The Brickers argue that, when Congress enacted section 210 in 1978, it focused exclusively on employees at nuclear facilities operated by the NRC and never even considered whether to extend whistleblower protection to employees of DOE contractors. Therefore, they argue that Congress's failure to provide a damages remedy for

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[3]Effective October 24, 1992, Congress amended 42 U.S.C. § 5851 to provide whistleblower protection for employees of DOE contractors. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(a), 106 Stat. 2776, 3123 (1992). These amendments, however, apply only to claims filed on or after October 24, 1992. Pub. L. No. 102-486, § 2902(i), 106 Stat. at 3125.

employees at DOE nuclear facilities was inadvertent and does not preclude a judicially created *Bivens* remedy.

We need not attempt to discern Congress's intent in 1978 when it passed section 210 of the Energy Reorganization Act because we conclude that Congress's subsequent decision regarding remedies for whistleblowers at DOE nuclear facilities undermines the Brickers' argument. Between 1986 and 1991, numerous bills that would have created whistleblower protections for employees of contractors operating nuclear facilities owned by the DOE were introduced in Congress; none was enacted.[4] It is true that we must be reluctant to draw conclusions concerning congressional intent from the mere failure of bills to pass. *Cf. Balelo v. Baldrige*, 724 F.2d 753, 762-63 (9th Cir.) (where the House of Representatives approved a bill but the Senate failed to act on it, this court observed that "the mere failure of [a] bill to be enacted does not demonstrate congressional disapproval of the ... program"), *cert. denied*, 467 U.S. 1252 (1984). Nevertheless, the various attempts at legislation may suggest that Congress's inaction, whatever its reason, was not wholly inadvertent. Moreover, in 1992, Congress enacted amendments to the Energy Reorganization Act of 1974 that provide whistleblower protection for employees at DOE nuclear facilities, including a provision that allows recovery of compensatory damages — precisely the remedy that the Brickers seek in this action. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902, 106 Stat. 2776, 3123-25 (1992) (codified at 42 U.S.C.A. § 5851 (West Supp. 1993)).

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[4]*See* S. 1622, 102d Cong., 1st Sess. (1991); H.R. 3160, 102d Cong., 1st Sess. (1991); S. 436, 101st Cong., 1st Sess. (1989); H.R. 3368, 101st Cong., 1st Sess. (1989); S. 1958, 101st Cong., 1st Sess. (1989); H.R. 3521, 101st Cong., 1st Sess. (1989); H.R. 3255, 101st Cong., 1st Sess. (1989); H.R. 1861, 101st Cong., 1st Sess. (1989); S. 2758, 100th Cong., 2d Sess. (1988); S. 2095, 100th Cong., 2d Sess. (1988); H.R. 4071, 100th Cong., 2d Sess. (1988); H.R. 1716, 100th Cong., 1st Sess. (1988); H.R. 5659, 99th Cong., 2d Sess. (1986).

Through these amendments, which came too late for the Brickers, Congress has provided an elaborate and comprehensive remedial scheme. Under these statutes, "[a]ny employee who believes that he has been discharged or otherwise discriminated against" because he has engaged in whistleblowing activities has the right to file a complaint with the Secretary of Labor ("the Secretary"). 42 U.S.C.A. § 5851(b)(1) (West Supp. 1993). The Secretary must then conduct an investigation of the complaint; if the results of the investigation support the complaint, the Secretary may issue an order granting relief after notice and an opportunity for a public hearing. 42 U.S.C.A. § 5851(b)(2)(A) (West Supp. 1993). The relief available includes: reinstatement of the complainant to his or her former position together with compensation (including back pay); compensatory damages; and costs and expenses of bringing the complaint (including attorneys' and expert witness fees). 42 U.S.C.A. § 5851(b)(2)(B) (West 1983). The statute also provides that any person "adversely affected or aggrieved" by the Secretary's order may obtain judicial review of the order. 42 U.S.C.A. § 5851(c) (West 1983). Finally, if a person fails to comply with the Secretary's order, the Secretary may file a civil enforcement action in federal district court. 42 U.S.C. § 5851(d) (West 1983).

[1] These amendments, however, provide only prospective relief; they apply to claims filed on or after October 24, 1992, the date of enactment. Pub. L. No. 102-486, § 2902(i), 106 Stat. at 3125. The fact that the amendments were given only prospective effect suggests that Congress did not inadvertently fail to provide relief to persons, such as the Brickers, who filed claims before October 24, 1992. Indeed, it is apparent from the legislative history that Congress decided to provide only prospective relief even though it was aware that harassment of whistleblowers had occurred in the past at DOE nuclear facilities, including Hanford. The House Report states that:

> [the amendments] broaden[ ] the coverage of existing whistleblower protection provisions to include

> . . . the Department of Energy ("DOE"), a contractor or subcontractor at a Department of Energy nuclear facility, or any other employer engaged in any activity under the Energy Reorganization Act or the Atomic Energy Act of 1954. . . .
>
> The ability of nuclear industry employees to come forward to either their employers or to regulators with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power. *Recent accounts of whistleblower harassment at . . . DOE nuclear facilities (e.g. Hanford, Oak Ridge, Rocky Flats) suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry.* These reforms are intended to address those remaining pockets of resistance.

H.R. Rep. No. 102-474, 102d Cong., 2d Sess., pt. VIII, at 78-79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 2296-97 (emphasis added).

[2] We cannot create a *Bivens* remedy if there are "indications that congressional inaction has not been inadvertent." *Schweiker*, 487 U.S. at 423; *see also McCarthy v. Madigan*, 112 S. Ct. 1081, 1090 (1992) (explaining that in applying the "special factors" analysis in *Schweiker* and *Bush*, "the Court found the *Bivens* remedy displaced because Congress had legislated an elaborate and comprehensive remedial scheme") (citations omitted). Because we cannot characterize as inadvertent Congress's decision not to include within its remedial scheme persons who filed claims before October 24, 1992, we are precluded from implying a *Bivens* remedy for the Brickers' claims. *See Schweiker*, 487 U.S. at 423 ("[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its

administration, we have not created additional *Bivens* remedies"); *Kotarski*, 866 F.2d at 312 ("[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment").

B. Alternative Remedies Available to the Brickers

The Brickers next contend that a *Bivens* remedy should be judicially created because no comprehensive statutory remedial scheme is available to them; Congress accordingly could not have concluded that it had provided remedies that it considered adequate at that time. In particular, the Bickers assert that the remedies available to Edwin Bricker cannot bar a *Bivens* action because they are administrative, rather than statutory, remedies. We disagree.

The district court described the remedies available to Edwin Bricker as follows. First, the DOE requires that a collective bargaining agreement ("CBA") at a contractor-operated facility should provide "an effective grievance procedure with arbitration as its final step[.]" 48 C.F.R. § 970.2201(b)(5)(ii) (1992). The CBA between Westinghouse and the Hanford Atomic Metal Trades Council contains a grievance procedure and requires that it be used to resolve "claims and disputes on all matters subject to collective bargaining." The CBA also provides for arbitration of any unsettled grievances that involve either the interpretation or application of a provision of the CBA or "[a] disciplinary penalty (including discharge) . . . which is alleged to have been imposed without just cause[.]"

Second, under 42 U.S.C. § 2201(i)(3) (1988), the DOE is authorized to prescribe regulations and orders "governing the design, location, and operation of facilities . . . in order to protect health and to minimize danger to life or property[.]" Pursuant to this statutory grant of authority, DOE issued Order 5438.1A, which establishes occupational health and safety

standards for GOCO facilities and prohibits discrimination against an employee who files a complaint or otherwise exercises his or her rights under the order. DOE Order 5438.1A provides a procedure for investigating claims of discrimination and states that "if it is found that such discrimination has occurred, the field organization shall assure that appropriate measures are taken by the contractor, including rehiring or reinstatement of the employee, restoration of lost seniority, and back pay."

Third, the National Labor Relations Act declares it an unfair labor practice for an employer to interfere with an employee's right to engage in "concerted activities for . . . mutual aid or protection", 29 U.S.C. § 157, and gives the National Labor Relations Board ("NLRB") broad discretion to devise remedies for such unfair labor practices, 29 U.S.C. §§ 158, 160. *See, e.g., Zurn Indus., Inc. v. NLRB,* 680 F.2d 683, 694 (9th Cir. 1982) (the NLRB "has jurisdiction to investigate unfair labor practices, which include discharges based on protected activity such as voicing safety complaints"), *cert. denied,* 462 U.S. 1131 (1983). The district court concluded that "[although] these remedies, either alone or in combination, do not constitute a comprehensive statutory scheme, they are in fact a remedial mechanism designed to provide relief in circumstances that exist in the instant case[.]"

We reject the Brickers' argument that these remedies are inadequate to preclude a *Bivens* action because they were not Congressionally authorized. First, this argument is inaccurate; the NLRA is a remedy created by Congress. Moreover, Edwin Bricker's remedies under DOE Order 5483.1A were created by the DOE pursuant to 42 U.S.C. § 2201(i)(3), in which Congress directed the DOE to create occupational safety and health regulations for its facilities. Thus, the remedies provided in DOE Order 5483.1A are authorized by Congress, by way of its grant of authority to the DOE. Indeed, this court previously has relied on administratively-created remedies to bar the creation of a *Bivens* remedy. *Berry v. Hollander,* 925

F.2d 311, 314-15 (9th Cir. 1991) (relying in part on administrative remedies created by the Veterans Administration's Department of Medicine and Surgery to bar *Bivens* action); *accord Heaney v. United States Veterans Admin.*, 756 F.2d 1215, 1220 (5th Cir. 1985) ("[w]here a coordinate branch of the government has provided a government employee with a procedure under which a constitutional claim arising out of the employment relationship is cognizable and some measure of relief may be obtained, a nonstatutory damage action is not available for discharge, demotion, or other adverse personnel actions absent clear evidence of an intent by the coordinate branch not to foreclose the nonstatutory damage remedy"). Finally, courts have held that administratively-created remedies can bar the judicial creation of additional remedies, even in the absence of a comprehensive statutory scheme. *See, e.g., Dynes v. Army Air Force Exchange Serv.*, 720 F.2d 1495, 1498 (11th Cir. 1983) (holding that a comprehensive administrative remedial scheme established by Army and Air Force regulations barred creation of a *Bivens* remedy); *Castella v. Long*, 701 F. Supp. 578, 584 (N.D. Tex.) (same; rejecting plaintiff's argument that *Bivens* action was barred "only where the remedial system was Congressionally created"), *aff'd mem.*, 862 F.2d 872 (5th Cir. 1988), *cert. denied*, 493 U.S. 936 (1989).

The Brickers rely heavily on the Eighth Circuit's decision in *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991), for the proposition that administratively created remedies cannot preclude a *Bivens* remedy. In *Krueger*, the Eighth Circuit held that an employee of a county office of the Agricultural Stabilization and Conservation Service ("ASCS"), a division of the United States Department of Agriculture, could maintain a *Bivens* action against various federal officials who allegedly had fired him in retaliation for whistleblowing activities. *Id.* at 1051-52, 1057. *Krueger*, however, is distinguishable from this case for three reasons. First, as the Eighth Circuit explained:

> [t]he statute creating the ASCS does not direct the Secretary of Agriculture to create a specific administrative scheme for overseeing the ASCS programs. Instead, the statute calls for the election of local county committees, and requires the Secretary to "make such regulations as are necessary relating to the selection and exercise of the functions of the respective committees, and to the administration, through such committees, of such programs."

927 F.2d at 1055 (quoting 16 U.S.C. § 590h(b)). Here, in contrast, the enabling statute pursuant to which the DOE promulgated Order 5483.1A specifically authorizes the DOE to create occupational health and safety regulations for its facilities. *See* 42 U.S.C. § 2201(i). The specificity of this statutory provision distinguishes this case from *Krueger*.

Second, the only remedy made available to Krueger under the Secretary of Agriculture's regulations was "appealing to the supervisor of those who fired him." *Krueger*, 927 F.2d at 1056. Here, in contrast, the remedies available to Bricker include a grievance procedure with arbitration as its final step, and the opportunity to file a formal complaint with the DOE, which it must investigate. Indeed, when Bricker filed his complaint pursuant to DOE Order 5483.1A, the DOE requested that a Department of Labor investigator examine the complaint. The investigator conducted an investigation and issued a report analyzing Bricker's claims. The DOE's final decision adopted the report's recommendations and granted monetary and other relief to Bricker.

[3] Third, the Eighth Circuit found that Congress's failure to provide additional remedies for ASCS employees was inadvertent. *Krueger*, 927 F.2d at 1057 (it "seems plain to us that Congress never has given a moment's thought to the question of what sort of remedies should be available to ASCS county office employees like Krueger"). Here, as we already have explained, Congress did not inadvertently fail to provide addi-

tional statutory remedies for whistleblowers at DOE nuclear facilities prior to 1992. Accordingly, we conclude that the remedies available to Edwin Bricker are sufficient to bar the judicial creation of a *Bivens* remedy. *Cf. Schweiker*, 487 U.S. at 421-22 ("[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation").

The Brickers also rely on *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992), which was decided after the Brickers' briefs were filed. At oral argument, the Brickers asserted that *McCarthy* precludes a finding that administratively created remedial schemes can foreclose the creation of a *Bivens* remedy.

In *McCarthy*, the Court held that prisoners need not exhaust the Federal Bureau of Prisons' (Bureau) grievance procedure before initiating a *Bivens* action against prison employees. Although the *McCarthy* opinion contains some language that can be read as favorable to the Brickers, we conclude for two reasons that *McCarthy* is not inconsistent with our holding here.

First, the grievance procedure at issue in *McCarthy* was qualitatively different from the remedies available to the Brickers. *See* 112 S.Ct. at 1085 ("The general grievance regulations do not provide for any kind of hearing or for the granting of any particular type of relief.") In contrast, as we already have noted, the Brickers options included arbitration (ultimately) under the CBA as well as potential remedies under DOE Order 5438.1A and the NLRA. Moreover, unlike the situation in *McCarthy* where monetary damages were entirely unavailable to the prisoner, DOE order 5438.1A expressly allowed recovery of monetary damages, at least with respect to back pay.

Second, the Court simply was not deciding the issue that we decide today. The Court was considering the propriety of

imposing an exhaustion requirement before institution of an *already recognized Bivens* action. The policy considerations underlying the Court's exhaustion analysis are inapplicable to the situation presented in this case. *See Id.*, 112 S.Ct. at 1087-88. For example, here there is no "doubt as to whether the [NLRB or DOE were] empowered to grant effective relief," *id.* at 1088. *See* 42 U.S.C. § 2201(i)(3) (1988); 29 U.S.C. §§ 158, 160. This case also does not arise in a context where "the administrative body is shown to be biased or [to have] otherwise predetermined the issue before it," *id.*, because the DOE (at least with respect to GOCO facilities) and the NLRB are not called upon to evaluate the rights of third-party's against their own employees when acting upon claims such as the Brickers'.

In sum, we conclude that the Court did not, when it decided the exhaustion issue presented in *McCarthy*, preclude our holding here—that the comprehensive administrative remedial mechanisms available to the Brickers, viewed against the background of congressional inaction that was not inadvertent, prevents the creation of a new *Bivens* remedy.

C. Nondelegation Doctrine

The Brickers' final argument is that, if the remedies available to Edwin Bricker are held to preclude a *Bivens* remedy, Congress has violated the nondelegation doctrine of Article 1, § 1 of the Constitution by granting the executive branch (the DOE) jurisdiction over their constitutional claims. To support their argument, the Brickers rely primarily on dicta in *Krueger*. *See Krueger*, 927 F.2d at 1055 (suggesting but not ruling that "to allow an administratively-created scheme to foreclose a *Bivens* action, without some real indication that Congress intended the administratively-created scheme to have that result, would require us to hold that the legislative power to foreclose a *Bivens* action has been delegated — a delegation almost certainly in violation of the separation of powers doctrine."). We reject this argument because we find

that 42 U.S.C. § 2201(i)(3), which grants DOE authority to create occupational safety and health regulations for its nuclear facilities, provides sufficiently specific standards to pass constitutional muster. *See Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (Congressional delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority") (quotation omitted); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990) ("[w]ith respect to federal agencies, only very broad, literally standardless grants of legislative power will offend the Constitution").

Accordingly, we affirm the district court's judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EDWIN L. BRICKER and CYNTHIA BRICKER, husband and wife, Plaintiffs, v. ROCKWELL HANFORD OPERATIONS, a division of ROCKWELL INTERNATIONAL CORPORATION, WESTINGHOUSE CORPORATION, and WESTINGHOUSE HANFORD COMPANY, Defendants.	NO. CY-90-3090-AAM **ORDER RE: SUMMARY JUDGMENT, *INTER ALIA*** (Filed Sep. 17, 1991)

On Thursday, June 13, 1991, the court conducted a hearing on defendants' motions to dismiss and for summary judgment. Michael Withey, Schroeter, Goldmark & Bender, and Thad Guyer, Government Accountability Project, appeared on behalf of plaintiffs. Stuart Dunwoody, Davis Wright Tremaine, represented defendant Westinghouse. David Jurca and Mark Rising, Helsell, Fetterman, Martin, Todd & Hokanson, represented defendant Rockwell.

I.

Plaintiff Edwin L. Bricker[1] began employment at the Hanford Nuclear Facility, Richland, Washington, with

[1] While the complaint also names Ed Bricker's wife, Cynthia, as a defendant, it is entirely void of any averment that Cynthia Bricker worked at Hanford.

Rockwell Hanford in July 1977. He left in August of 1979 to attend college and returned to the employ of Rockwell Hanford in February of 1983 as a nuclear process operator. Bricker was employed at Hanford's Plutonium Finishing Plant in 1983 and reported numerous alleged health, safety and environmental conditions which he believed had the potential of harming the health and safety of workers and the public. In 1984 Bricker transferred to the Hanford tank farm area.

As a result of the work Bricker performed, the conduct he observed, and conversations he held at Hanford, Ed Bricker purportedly became concerned about the operations at Hanford, safety violations and unsafe work practices, particularly at the Plutonium Finishing Plant, the tank farm, and the Z-plant. Bricker took steps to voice his concerns with co-employees, supervisors, agents and officials of the defendants who were in a position to respond to and/or correct or address the alleged problems.

Bricker contends that the defendants' agents, officials, and employees denied that there were any safety problems or unsafe work practices at Hanford, concealed crucial information about such safety violations and practices, and discredited him. Bricker further contends that when he determined it was clear that the defendants were not responding to his well-founded concerns about the safety violations and unsafe work practices, he articulated these same concerns to representatives of the United States Congress, wrote letters to the editors of newspapers, and contacted and spoke to newspaper and television reporters.

Bricker alleges that in response thereto and in order to suppress the exercise of his constitutional rights and for the specific purpose and deliberate intention of injuring him, the defendants engaged in a concerted and joint effort and in conspiracy with one another and others to: (1) Terminate Bricker from employment with the defendants; (2) retaliate against Bricker for the exercise of his constitutional rights to free speech and association; (3) conduct an improper campaign of harassment and intimidation against the Brickers and their congressional and press contacts; (4) implement a program to gather information on Bricker and his congressional and press contacts, including spying, surveillance, and unreasonable searches and seizures of conversations and physical effects; (5) use friends and associates of Bricker as informants and stool pigeons to attempt to gather derogatory information about Bricker for defendants' improper and wrongful purposes; (6) conduct a secret and public campaign in an attempt to smear and discredit Bricker and cause him to lose credibility; (7) compel Bricker to go to psychologists for psychiatric evaluation and treatment in order to further discredit and humiliate him; (8) intentionally inflict emotional distress on Bricker; and (9) deprive Bricker of due process of law by rejecting his complaints, punishing him for bringing complaints, and requiring him to engage in fruitless procedures to voice his grievances, all for the purpose of and intent to further injure, discredit, and harass him.

II.

Framed as a motion to dismiss for failure to state a claim under **Fed.R.Civ.P.** 12(b)(6), resolution of the

Motion to Dismiss Constitutional Claims requires reference to material outside the pleadings. Accordingly, as allowed by Rule 12(b), the court shall treat the motion to dismiss as one seeking summary judgment. The court's decision to do so is made easier by the fact that the parties have submitted a vast amount of material in support of separately filed motions for summary judgment that were heard in conjunction with the motion to dismiss.

III.

While the Bricker' complaint sets forth a multitude of legal claims, they can readily be placed into two specific categories; (1) federal *Bivens* claims and (2) pendent state law claims. Plaintiffs' constitutional claims are predicated upon First Amendment rights to free speech and association, Fourth Amendment right to be free from unreasonable searches and seizures, and (while not specifically articulated) apparently Fifth Amendment due process and privacy rights.

Defendants Westinghouse and Rockwell have conducted operations and provided services at the Hanford Nuclear Facility under contract with the United States. Hanford is commonly referred to as a government-owned, contractor-operated (GOCO) facility. Plaintiffs claim the defendants were delegated functions by the United States which were traditionally reserved for governmental agencies. Plaintiffs conclude that the relationships and links between the defendants and the United States were such as to make the defendants federal actors and thus, subject to a *Bivens* action for violations of

constitutional rights. While the defendants have not raised the issue of their "private party" status by way of this set of motions, they do not concede that they are federal actors for purposes of fashioning a *Bivens* remedy.

The record as it currently stands is insufficient for any determination as to whether defendants are "federal actors" against whom liability can be imposed under *Bivens*. Nor, for purposes of defendants motion to dismiss constitutional claims, shall the court assume that the defendants are federal actors.

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 389 (1971), the Supreme Court established that the victims of a constitutional violation by a federal agent have a right to recover damages from the agent in federal court despite the absence of any statute conferring such a right. The *Bivens* ruling was based, in part, upon the Court's finding no special factors counselling hesitation in the absence of affirmative action by Congress and no explicit congressional declaration that money damages may not be awarded, but must instead be remitted to another remedy equally effective in the view of Congress. *Bivens*, 403 U.S. at 396-97. The Court also recognized that it was not dealing with a question of federal fiscal policy, which in specified instances should prevent creation of a *Bivens* remedy. *Id.* at 396.

The basis for *Bivens* subject matter jurisdiction is 28 U.S.C. 1331 which gives this court "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331; *See Bush v. Lucas*, 462 U.S. 367, 374 (1983). *Bivens* actions lie only for violations of rights secured by the Constitution. *Bivens*,

403 U.S. at 396-97. In this vein, the court notes that the Supreme Court has specifically allowed *Bivens* actions for violations of the Fourth Amendment, *Bivens*, 403 U.S. at 397, the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 248-49 (1979), and the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14, 19 (1980).

Defendants move to dismiss plaintiffs' constitutional claims contending a *Bivens* remedy is barred by a congressionally created alternative remedial scheme and the concept of "special factors counselling hesitation" first articulated in *Bivens* and later significantly expanded in *Bush v. Lucas*, 462 U.S. 367 (1983) and *Schweiker v. Chilicky*, 487 U.S. 412 (1988). The plaintiff in *Bush v. Lucas* was a federal employee who had publicly criticized his employing agency and was subsequently demoted. He alleged his First Amendment rights were violated by the demotion. Through administrative channels he won retroactive restoration of his position and $30,000 in backpay but still attempted to maintain a *Bivens* action against his supervisors. The *Bush* Court, for purposes of its decision, assumed that Bush's First Amendment rights were violated and that the civil service remedies available to him were less effective than a damages remedy, found that because Bush's claims arose "out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States" it was inappropriate to supplement the new regulatory scheme with a judicially created remedy like *Bivens*. *Bush v. Lucas*, 462 U.S. at 368. The Court stressed that the case involved policy questions in an area that had received careful attention from Congress. *Id.* at 380-88.

The *Bush* rationale was taken several steps further in *Schweiker v. Chilicky*, 487 U.S. 412, which held that even an incomplete statutory remedy rendered a *Bivens* cause of action unavailable. While recognizing that the congressionally created remedy for wrongful termination of Social Security benefits failed to provide complete relief because it did not allow for money damages to compensate independently for constitutional violations, the Court nonetheless found such a remedy adequate.

> [T]he concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an **appropriate judicial deference to indications that congressional inaction has not been inadvertent.** When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that occur in the course of its administration, we have not created *Bivens* remedies. (emphasis added)

Chilicky, 487 U.S. at 423. The Court specifically recognized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the federal [official] responsible for the [constitutional] violation." *Id.* at 421-22.

The Ninth Circuit has applied the *Chilicky* expansion in a number of cases and held that where Congress has provided *some* mechanism for relief, *Bivens* claims are precluded. *Berry v. Hollander*, 925 F.2d 311 (9th Cir. 1991) (combination of remedies under Civil Service Reform Act, 5 U.S.C. § 1206-08, Federal Employees Compensation Act,

5 U.S.C. § 8101, and statute governing Veterans Administration disciplinary proceedings, 38 U.S.C. § 4110, is adequate to preclude *Bivens* remedy for VA physician who claimed denial of First and Fifth Amendment rights in connection with harassment and retaliation for his reporting incidents of possible surgical malpractice). *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991) (Social Security claims representative who brought a *Bivens* action against supervisors for opening his personal mail barred from doing so because Civil Service Reform Act provided adequate remedy). *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989) (Civil Service Reform Act precludes *Bivens* remedy).

Westinghouse and Rockwell move to dismiss all constitutional claims lodged against them on the grounds that a *Bivens* remedy cannot be fashioned in light of the existing remedies available to plaintiff by way of: (1) the grievance procedure under the collective bargaining agreement; (2) the remedial process set forth in DOE Order 5483.1A; and (3) an unfair labor practice claim under 29 U.S.C. §§ 157 and 158. In addition, the defendants argue that any congressional inaction was not inadvertent. Finally, defendants contend that federal fiscal policy prohibits creation of a *Bivens* remedy in this case.

The Department of Energy (hereafter DOE) requires that collective bargaining agreements at its government-owned contractor-operated (GOCO) facilities contain "an effective grievance procedure with arbitration as its final step. . . . " 48 C.F.R. § 970.2201(b)(5)(ii). Defendants argue that the collective bargaining agreement between Westinghouse and the Hanford Atomic Metal Trades Council contains a grievance procedure and requires that it be

used to resolve "claims and disputes on all matters subject to collective bargaining" irrespective of whether they require interpretation of the contract (Ct. Rec. 30, Turnbow declaration, Ex. C, Art. XVIII, ¶ 6). The collective bargaining agreement further provides for arbitration of any unsettled grievance that involve either "[t]he interpretation or application of a provision of this agreement" or "[a] disciplinary penalty (including discharge) . . . which is alleged to have been imposed without just cause. . . . " (Ct. Rec. 30, Turnbow declaration, Ex. C, Art. XIX, ¶ 1). Defendants argue that any claim that the safety provisions of the collective bargaining agreement were violated or that an employee has suffered retaliation for raising a safety concern should be raised in the grievance procedure.

Defendants next claim that 42 U.S.C. § 2201(i)[2] gives the Department of Energy the authority to protect health and to minimize danger to life or property. It is pursuant to this statute that DOE promulgated Order 5483.1A (attached as exhibit A to the Dutton declaration) which prescribes occupational health and safety standards for government-owned, contractor-operated (GOCO) facilities. It specifically forbids discrimination against an employee who files an OSHA complaint or otherwise

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[2] "In the performance of its functions the [Atomic Energy] Commission is authorized to –

(i) prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property."

exercises his or her rights under the law.[3] It is upon the remedial process set forth in DOE Order 5483.1A which defendants contend precludes this court from fashioning a *Bivens* remedy for plaintiffs' claims.

Plaintiffs' response to both arguments is twofold. Their first attack on the administrative remedies is directed at which they perceive as an absence of a high level of direct congressional involvement in the development of either the grievance procedure or DOE Order 5483.1A. They contend that because the grievance procedure is based solely on regulations created through the unilateral *sua sponte* decision of the Secretary of the

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[3] Chapter III of Order 5483.1A provides in relevant part:

"No contractor shall discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, or take any other negative actions against any contractor employee as a result of the employee's filing of a complaint, or in any other fashion, exercising on behalf of himself or herself or others any right set forth in this Order.

Any employee who believes he or she has been discharged or in any other manner discriminated against, in violation of this Order, may file a complaint with the cognizant CO OR CO representative within 30 days after the alleged discrimination, setting forth the nature of the alleged discrimination. The CO or CO representative, the safety and health director, and other appropriate elements of the field organization shall investigate the complaint, and if it is found that such discrimination has occurred, the field organization shall assure that appropriate measures are taken by the contractor, including rehiring or reinstatement of the employee, restoration of lost seniority, and back pay. The field organization shall report the disposition of the matter to the contractor employee filing the complaint of alleged discrimination within 30 days after receipt of the complaint."

Department of Energy, not by clearly announced congressional mandate, it cannot be the basis for denial of a *Bivens* remedy. Plaintiffs second attack proceeds directly to the adequacy of the remedies. Simply, that neither the grievance procedure nor DOE Order 5483.1A is a comprehensive scheme contemplated as a remedial mechanism for constitutional violations.

The previously quoted portion of *Chilicky* defines the concept of "special factors" to include "appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Chilicky* also recognizes that a *Bivens* remedy should not be created when the design of a government program suggests that congress has provided what it considers adequate remedial mechanisms for constitutional violations. Plaintiffs concede the former in their reply by suggesting that in order for a *Bivens* remedy to stand the court must determine whether the failure by Congress of money damages, or other significant relief, was inadvertent. It is upon Congress's perceived inadvertence which plaintiffs' claims hinge.

The Energy Reorganization Act of 1974 created the Energy Research and Development Administration (subsequently the Department of Energy) and the Nuclear Regulatory Commission. The Act was divided into four separate titles, now subchapters. Subchapter I establishes the Energy Research and Development Administration (now DOE) and defines its responsibilities. Subchapter II establishes the Nuclear Regulatory Commission and defines its responsibilities. Subchapter III sets forth miscellaneous and transitional provisions. Subchapter IV is a specific prohibition of sex discrimination under the entire Energy Reorganization Act of 1974. At its inception, the

Energy Reorganization Act of 1974 did not contain specific "whistleblower" protection provisions.

In 1978 section 210 of Pub.L. 93-438 amended subchapter II of the Energy Reorganization Act of 1974 to include a specific whistleblower protection provision. The Fourth Circuit has previously recognized what this court now recognizes, that "it appears that Congress was deliberate in assigning all provisions relating to the Nuclear Regulatory Commission to" subchapter II. *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991). That deliberateness appears to have continued with the whistleblower amendment to subchapter II. As evidence in support of the separateness of subchapters I and II of the Energy Reorganization Act of 1974, the Fourth Circuit in *Adams v. Dole* acknowledged that the explicit prohibition against sex discrimination is contained in subchapter IV and is applicable to both the DOE and the NRC. *Id.* The inescapable conclusion (one that the *Adams* court reached) – if Congress wanted to make the whistleblower provision applicable to both the DOE and the NRC, it would have amended subchapter IV, not subchapter II. *Id.* Moreover, as *Adams v. Dole* also notes, at the time section II was amended, the DOE already had in effect its own internal provisions protecting whistleblowing activities – the predecessor provisions of DOE Order 5483.1A. *Id.*

In recent years, members of Congress have introduced legislation which sought to apply the whistleblowing provisions of 42 U.S.C. § 5851 and OSHA (29 U.S.C. § 651 *et seq.*) to the DOE. All have failed.

On October 8, 1986 in material in extension of remarks in the House of Representatives, the Honorable Thomas A. Luken of Ohio stated:

> "Mr. Speaker, today I am introducing legislation [Nuclear Whistleblower's Protection Act Amendments of 1986] that will close a loophole in our laws that leaves many employees without protection if they blow the whistle against practices at nuclear facilities that endanger either the public or their coworkers. These employees are found at facilities that are owned by the Department of Energy and operated by private contractors."

132 Cong.Rec. E3479-02 (October 7, 1986) (statement of Rep. Luken). The amendments did not pass.

On March 2, 1988 the Honorable Jim Slattery of Kansas introduced H.R. 4071 entitled the Nuclear Whistleblowers Protection Act Amendments of 1988. 134 Cong. Rec. H630-02 (March 2, 1988) (Statement of Rep. Slattery). The amendments sought to extend the whistleblower protections of section 210 of the Energy Reorganization Act of 1974 (42 U.S.C. § 5851) to the employees of contractor-operated Department of Energy nuclear facilities. 135 Cong.Rec. E794-02 (March 23, 1988). The amendments, however, failed.

In the Nuclear Facilities Occupational Safety Improvement Act of 1989, H.R. 3521, Congress sought to extend the provisions of the Occupational Safety and Health Act (OSHA) to Department of Energy nuclear facilities. The act failed.

In 1990 Congress sought to enact the Employee Health and Safety Whistleblower Protection Act, S.436.

Senate Report 101-349 (June 28, 1990) recites one of the primary purposes of the bill.

> Finally, one particular gap in coverage deserves special mention because its existence is not apparent from a review of current statutes. Employees at government-owned, contractor-operated (GOCO) nuclear weapons facilities have no statutory protection from retaliation when they report health or safety violations. James Simpkin, formerly an employee at the Hanford, Washington GOCO facility, provided compelling evidence of this problem. During the 100th Congress, at the request of the House Energy and Commerce Committee, Mr. Simpkin testified about safety problems at the Hanford facility. Upon his return to work after his congressional testimony, the private contractor operating the Hanford facility began a campaign of intimidation and harassment that ultimately forced Mr. Simpkin to leave his job. At a subsequent congressional hearing convened specifically to review the retaliation against Mr. Simpkin, the Department of Energy, the owner of the facility, publicly admitted that (1) Mr. Simpkin was an excellent employee; (2) his belief that he had been harassed out of his job by the contractor because of his earlier testimony was reasonable; and (3) the Department of Energy failed to protect him. See Safety at DOE Nuclear Weapons Facilities: Hearings before the Subcommittee on Oversight and Investigations of the of the House Committee on Energy and Commerce, 100th Cong. 2nd Sess. 542-45 (1988).
>
> Mr. Simpkin, and other GOCO facility worker, are caught in limbo. They are not considered federal employees, so they may not take

> advantage of the whistleblower protections under the Civil Service Reform Act. But under current interpretations of section 210 of the Energy Reorganization Act, which protects private sector workers licensed by the Nuclear Regulatory Commission, GOCO facility workers are outside the scope of coverage. See, e.g., Wensil v. B.F. Shaw Co., 86-ERA-15 (Secretary of Labor, March 29, 1990); 4(b)(1) Report at 12. Therefore, Mr. Simpkin had no federal statutory remedy. His only option was to rely on the very weak administrative system established within the Department of Energy – a system that failed him miserably. [footnote omitted]

The bill failed.

Congressional inaction that is inadvertent? Hardly. The congressional record is clear that Congress is and has been aware of the situation regarding "whistleblowers" at GOCO facilities, but has failed to enact a comprehensive statutory remedial scheme. It is difficult to imagine a stronger case of what this court shall term "deliberate inaction." *Chilicky's* pronouncement is similarly clear – this court must afford **appropriate judicial deference to indications that congressional inaction has not been inadvertent.** Accordingly, the court cannot create a *Bivens* remedy under these circumstances.

The court also finds that there is a "special factor" which, coupled with Congress's deliberate inaction, further supports the decision not to create a *Bivens* remedy.

This special factor is the existing remedial scheme previously described.[4] While the court recognizes that these remedies, either alone or in combination, do not constitute a comprehensive statutory scheme, they are in fact a remedial mechanism designed to provide relief in circumstances that exist in the instant case as evidenced by the United States Department of Labor, Occupational Safety & Health Administration, Final Investigation Report. The report is based on a written complaint filed by Ed Bricker pursuant to DOE Order 5483.1A and finds that Bricker

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[4] (1) The grievance procedure under the collective bargaining agreement, (2) the remedial process set forth in DOE Order 5483.1A, and (3) an unfair labor practice claim under 29 U.S.C. §§ 157 and 158. The NLRA declares it an unfair labor practice for an employer to interfere with employee rights protected under the NLRA, which include the right to engage in "concerted activities for . . . mutual aid or protection," 29 U.S.C. § 157, and gives the National Labor Relations Board broad discretion to formulate remedies for such unfair labor practices. 29 U.S.C. § 158, 160. Defendants argue that Bricker's complaints regarding safety and health are protected concerted activity, making any retaliation by WHC against Bricker for making the complaints an unfair labor practice. The National Labor Relations Board has jurisdiction to investigate unfair labor practices, including discharges based upon protected activity such as safety complaints. *Zurn Industries Inc. v. NLRB*, 680 F.2d 683, 694 (9th Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983).

Plaintiffs initially respond by stating that an unfair labor practice remedy does not extend to constitutional violations by federal actors acting under color of federal authority. Their characterization of the claim, however, is not dispositive of the issue. The issue is whether Congress has provided what it considers adequate remedial mechanisms for constitutional violations. Without citing to any authority, plaintiffs argue that Ed Bricker does not have a claim for relief under the National Labor Relations Act.

was discriminated against for raising safety and health concerns. More importantly, the report recommends that (1) Bricker's files be expunged of all negative references regarding his protected activity, (2) Bricker be awarded back pay and out-of-pocket expenses, and (3) the appropriate notice be posted at his work location advising other employees of the action taken.

IV.

In light of the foregoing, **IT IS HEREBY ORDERED** that defendants' Motion to Dismiss Constitutional Claims be **GRANTED.** The complaint and claims contained therein as they relate to plaintiffs' *Bivens* claims are **DISMISSED WITH PREJUDICE.**

V.

IT IS FURTHER ORDERED, there being no independent basis for subject matter jurisdiction, plaintiffs' pendent state law claims are **DISMISSED WITHOUT PREJUDICE.** *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966); *Jones v. Community Redevelopment Agency,* 733 F.2d 646, 651 (9th Cir. 1984).

VI.

IT IS FINALLY ORDERED that all motions heretofore not ruled upon are **DENIED AS MOOT.**

IT IS SO ORDERED. The Clerk shall enter this Order and forward copies to counsel.

DATED this 17 day of September, 1991.

/s/ Alan A. McDonald
ALAN A. McDONALD
United States District Judge

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(2)

Supreme Court, U.S.
FILED
SEP 12 1994
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No. 94-120

In The

Supreme Court of the United States

October Term, 1994

EDWIN L. BRICKER and CYNTHIA BRICKER,

Petitioners,

v.

ROCKWELL HANFORD OPERATIONS, a Division of ROCKWELL INTERNATIONAL CORPORATION; WESTINGHOUSE ELECTRIC CORPORATION; and WESTINGHOUSE HANFORD COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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16 pp

QUESTION PRESENTED FOR REVIEW

Whether "special factors" exist and bar a former employee of government contractors at a Department of Energy facility from maintaining a *Bivens* action against his former employers where

(i) Congress' enactment of some remedies and its repeated consideration and rejection of proposed legislation to create additional remedies shows that its failure to create the exact remedy that the former employee seeks has not been inadvertent, and

(ii) the former employee had available to him and made use of alternative remedies for redressing the wrong he alleges.

PARTIES TO THE PROCEEDING

The parties in the court of appeals were Edwin L. Bricker and Cynthia Bricker, plaintiffs/appellants, and Rockwell Hanford Operations, an unincorporated division of Rockwell International Corporation, and Westinghouse Hanford Company, defendants/appellees. Although Westinghouse Electric Corporation appears in the caption of the case, it was dismissed from the action by stipulation of the parties in the district court.

RULE 29.1 LISTING

Rockwell International Corporation has no parent companies or subsidiaries (except wholly-owned subsidiaries). Westinghouse Electric Corporation is the parent company of Westinghouse Hanford Company. Westinghouse Hanford Company has no other parent companies and no subsidiaries.

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No. 94-120

In The

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EDWIN L. BRICKER and CYNTHIA BRICKER,

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ROCKWELL HANFORD OPERATIONS, a Division of ROCKWELL INTERNATIONAL CORPORATION; WESTINGHOUSE ELECTRIC CORPORATION; and WESTINGHOUSE HANFORD COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

CITATIONS OF OPINIONS BELOW

The opinion of the court of appeals is reported at 22 F.3d 871. The opinion of the district court is reported at 1991 WL 268026.

STATEMENT OF THE CASE

This case arises out of the employment of petitioner Edwin Bricker at the Hanford Nuclear Reservation in

Southeastern Washington, an installation owned by the United States and managed by the United States Department of Energy. Respondent Rockwell International Corporation operated portions of the Hanford Reservation under contract with DOE from July 1977 through June 28, 1987, and employed Mr. Bricker there for much of that time. Rockwell left the Hanford Reservation as of June 29, 1987, when respondent Westinghouse Hanford Company became DOE's consolidated management contractor at the site. At the same time Westinghouse became Mr. Bricker's employer. Westinghouse continued to employ Mr. Bricker until November 1, 1991, when he voluntarily resigned his position.

Petitioners contend that, starting in the early 1980s, Mr. Bricker became concerned about safety violations and unsafe work practices at the Hanford Reservation and raised these concerns to his supervisors, to managers at Rockwell and then Westinghouse, to members of Congress, and to the news media. Petitioners claim that first Rockwell and then Westinghouse retaliated against Mr. Bricker as a result of his voicing these concerns.[1]

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[1] Neither of the courts below reached the substance of petitioners' allegations of harassment and retaliation, which respondents vigorously deny. The factual allegations contained in the Petition thus remain unproved, and in fact a number of those allegations are contradicted by Mr. Bricker's sworn deposition testimony. Respondents will not engage in a point by point rebuttal of the factual misstatements contained in the Petition, however, because they have no bearing on the question of what issues would properly be before the Court if certiorari were granted. *See* S. Ct. R. 15.1.

In October 1988, Mr. Bricker submitted an administrative complaint to the Department of Energy pursuant to a DOE Order governing occupational health and safety, in which he claimed that Rockwell and Westinghouse had harassed him in retaliation for his having engaged in safety-related activities. At the request of the Department of Energy, an investigator from the Department of Labor investigated Bricker's allegations.

While the investigator found that most of Mr. Bricker's allegations were unfounded, he did find that some discrimination had occurred and recommended as a remedy that negative references to Mr. Bricker in his personnel files be expunged, that a disciplinary notice that Rockwell had issued to Mr. Bricker be rescinded, that Mr. Bricker be paid $126.54 for the one day of wages that he lost and $2,885 for his out-of-pocket expenses, and that an appropriate notice be posted at Mr. Bricker's place of employment at the Hanford Reservation. Mr. Bricker (and respondents) appealed from the investigator's findings and conclusions, but all parties subsequently dropped the appeal. All aspects of the remedy recommended by the investigator have since been implemented.

Shortly after the Department of Labor investigator issued his report, petitioners filed this action against Rockwell and Westinghouse in the United States District Court for the Western District of Washington, seeking damages of thirty million dollars and contending that the alleged harassment of Mr. Bricker both violated petitioners' rights under the First, Fourth, and Fifth Amendments to the United States Constitution and constituted common-law torts under the law of Washington.

Petitioners based their constitutional claims on the authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which permits, under certain circumstances, damages suits against federal officials who violate federal constitutional rights under color of federal law. Petitioners asserted that Rockwell and Westinghouse were "federal actors" and were therefore subject to suit under *Bivens*. Rockwell and Westinghouse deny that they are federal actors, and neither the district court nor the court of appeals has decided the issue. *See* Appendix to Petition ("Pet. App.") at App. 7 n.2, App. 25.

The case was transferred, with the consent of the parties, to the United States District Court for the Eastern District of Washington which, without reaching the substance of petitioners' allegations, dismissed the constitutional claims on the ground that the "special factors counselling hesitation" recognized by this Court in *Bivens* were present and precluded petitioners from maintaining a *Bivens* action. The district court dismissed petitioners' state law claims without prejudice. The court of appeals affirmed the district court's ruling in all respects, and unanimously rejected petitioners' request for rehearing en banc.

After the district court dismissed their federal action, petitioners filed suit in the Superior Court of Thurston County, Washington, realleging the state law claims they had asserted in the federal action. The Thurston County Superior Court has since dismissed all of petitioners' claims against Rockwell and a portion of their claims

against Westinghouse as barred by the statute of limitations. That ruling is currently on appeal to the Washington Court of Appeals; petitioners' remaining state law claims against Westinghouse are still pending in Thurston County Superior Court.

REASONS FOR DENYING THE WRIT

The Petition should be denied, both because the issue it presents will not recur in future cases and thus is of historical interest only, and because the decisions below were correctly decided and are fully consistent with the decisions of this Court and of the courts of appeals.

I. The Issue Petitioners Present Is Not Sufficiently Important to Justify Review by This Court.

A recent statutory amendment ensures that the question that petitioners present will not arise in cases that are filed after October 24, 1992. The issue thus is a narrow one that does not justify review by this Court on certiorari.

The question that petitioners present is whether the "special factors" recognized by this Court in *Bivens* and its progeny preclude a plaintiff such as Mr. Bricker, who claims that he has suffered retaliation for voicing health or safety concerns about a DOE installation, from maintaining a damages action directly under the United States Constitution. A recent amendment to Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, providing remedies for employees of DOE contractors who have

claims for such retaliation arising on or after October 24, 1992,[2] constitutes, under this Court's decisions in *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), a "special factor" that would bar any *Bivens* actions by DOE contractor employees for claims arising after that date.

The question that petitioners present, therefore, is whether special factors existed *before* Congress amended Section 210 of the Energy Reorganization Act in October of 1992. This question will only have bearing on those claims by employees of DOE contractors that arose before October 24, 1992 and are not yet barred by the statute of limitations.[3] The issue thus is of historical interest only and will not recur in future cases. It is not an issue worthy of this Court's review on certiorari.

II. The Decision of the Court of Appeals Is Correct and Is Consistent With Other Authority.

In any event, the decisions below are correct and do not conflict with any other authority.

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[2] The amendment was made by the Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(a), 106 Stat. 2776, 3123 (1992), and applies to claims that are filed on or after the date of its enactment, October 24, 1992. *Id.*, § 2902(i), 106 Stat. at 3125.

[3] Counsel for respondents are aware of only one other case currently pending in which an employee of a DOE contractor asserts a *Bivens* claim that arose before October 24, 1992 against his employer, *Lekvold v. Westinghouse Hanford Co.*, 26 F.3d 131 (9th Cir. 1994) (table), *petition for cert. filed*, No. 94-310 (U.S. Aug. 17, 1994).

Under this Court's decisions in *Bush* and *Chilicky*, special factors bar a *Bivens* suit when alternative remedies exist for the harm that the plaintiff alleges. Special factors will also bar suit even where no alternative remedy exists, so long as Congress' failure to provide the precise remedy that the plaintiff seeks has not been inadvertent. *Chilicky*, 487 U.S. at 423. The courts below correctly held that Congress' failure to provide petitioners with the precise remedy they seek had not been inadvertent, and that petitioners had alternative remedies.

A. Congress' Failure to Provide the Precise Remedy That Petitioners Seek Was Not Inadvertent.

Congress' failure to create a remedy for persons in Mr. Bricker's position – employees of DOE contractors who voice health and safety concerns at DOE installations – was anything but inadvertent.

This is clear first from Congress' enactment in 1978 of Section 210 of the Energy Reorganization Act. As originally enacted, Section 210 protected only employees of commercial nuclear facilities from retaliation. 42 U.S.C. § 5851 (1988). As the district court recognized, relying on the decision of the Fourth Circuit in *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir.), *cert. denied*, 112 S. Ct. 122 (1991), Congress deliberately excluded employees of DOE contractors from the protections of Section 210 when it first enacted the statute. Pet. App. at App. 31 - App. 32. Its failure to provide those protections to persons such as Mr. Bricker thus was not inadvertent.

Congress' lack of inadvertence in providing the remedy petitioners seek for employees of DOE contractors

was repeatedly demonstrated between 1978, when Section 210 was first enacted, and 1992, when it was finally amended to include employees of DOE contractors. During that time Congress repeatedly considered and, until 1992, rejected bills that would create protections for whistleblowers at DOE installations.[4] Although none of the bills was enacted, they received substantial attention from Congress. Many of the bills had numerous co-sponsors. One bill, S. 436, 101st Cong., 1st Sess. (1989), was favorably reported to the full Senate in a report noting the current lack of whistleblower protection for contractor employees at DOE facilities. *See* S. Rep. No. 349, 101st Cong., 2d Sess. 17-18 (1990). Furthermore, Congress considered these bills at the same time that it was enacting whistleblower protections for other classes of employees.[5] These failed bills thus show that Congress' failure to enact protections for DOE employees before October 1992 was not inadvertent.[6]

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[4] Some (but not all) of these bills are cited in the opinion of the court of appeals. *See* Pet. App. at App. 11 n.4.

[5] For example, a bill to create whistleblower protections for employees of Department of Defense contractors, H.R. 2579, 101st Cong., 1st Sess., and a bill to create protections for employees of DOE contractors, H.R. 3255, 101st Cong., 1st Sess., were both considered at a joint hearing of a subcommittee of the House Armed Services Committee. *See* Lexis Bill Tracking Reports 1989 H.R. 2579 and 1989 H.R. 3255. Congress enacted the first bill as part of the Defense Authorization Act for Fiscal Year 1991, 10 U.S.C. § 2409a, but failed to enact the bill that would have created similar protections for DOE contractor employees.

[6] The courts below did not consider the failed legislation to construe a previously enacted statute, *see* Pet. at 12-13 (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650

Finally, as the court of appeals recognized, Congress' lack of inadvertence is shown by the very enactment of the amendments to Section 210 and by the decision to give those amendments only prospective effect. Pet. App. at App. 11 - App. 12.

B. The Alternative Remedies Available to Petitioners Also Bar Their *Bivens* Claim.

The courts below also correctly held, as an independent ground for their decisions, that alternative remedies were available to petitioners and constitute a special factor barring them from a judicially-created *Bivens* action. Pet. App. at App. 14 - App. 19 and App. 35 - App. 36. Specifically, Mr. Bricker availed himself of the remedies offered by DOE Order 5483.1A, and the court of appeals properly found that this remedy was congressionally authorized. Pet. App. at App. 15 - App. 16. In addition, as the courts below recognized, Mr. Bricker had remedies under the grievance and arbitration provisions of his collective bargaining agreement and under the National Labor Relations Act.[7] Petitioners' arguments that the

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(1990)). Rather, they properly considered the failed bills to determine that Congress was aware of the issue and that its failure to enact the remedy that petitioners seek was not inadvertent. *See Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983).

[7] The courts of appeals recognize that remedies under a collective bargaining agreement and the NLRA constitute special factors that will bar a *Bivens* claim. *See, e.g., Pereira v. United States Postal Service*, 964 F.2d 873 (9th Cir. 1992) (collective bargaining remedy); *McCollum v. Bolger*, 794 F.2d 602 (11th Cir. 1986) (same), *cert. denied*, 479 U.S. 1034 (1987); *Ellis v. United*

decisions below conflict with *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992), and *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991), were considered and properly rejected by the court of appeals. *See* Pet. App. at App. 16 - App. 19.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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September 12, 1994.

States Postal Service, 784 F.2d 835 (7th Cir. 1986) (same); *Gaj v. United States Postal Service*, 800 F.2d 64, 68 (3d Cir. 1986) (NLRA remedy).